Supreme Court, U.S.
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NO. 90-1456

In The

Supreme Court of the United States

October Term, 1990

FREDRIC GERSON LEVIN,
Petitioner,

versus

THE FLORIDA BAR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY TO BRIEF IN OPPOSITION

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QUESTIONED PRESENTED

Whether an attorney's First Amendment rights of free speech and Fourteenth Amendment rights of equal protection are abridged when, solely on the ground that the attorney stated an opinion against a misdemeanor statute, the attorney is selectively prosecuted and subjected to increased disciplinary penalities by the integrated bar and state supreme court for violation of that statute.

TABLE OF CONTENTS

Question Presented for Review i

Statement of the Case 1

Argument 3

Tab G A-24

Tab H A-26

STATEMENT OF THE CASE

Apparently Respondent has decided to unilaterally attempt to abandon the stipulation announced in open court (Petition for Writ of Certiorari, p. A-2) and to ignore the Opinion handed down by the Florida Supreme Court (Petition for Writ of Certiorari, pp. A-11 through A-14). These two matters of record establish that six other lawyers were called before a grievance committee of the Florida Bar on "similar charges" which were "based upon essentially the same set of facts" (A-2), that some of those six attorneys received no penalties and the others received only private reprimands (Petition for Writ of Certiorari, p.A-2), and that the Florida Supreme Court imposed harsher discipline on Petitioner because of his public statements of his opinion (A-12).

Respondent also attempts to argue that Petitioner stated he would continue to gamble illegally, and that the sanctions imposed upon him were only slightly harsher than those imposed on the six other attorneys charged with the same conduct as Petitioner. Appended to this Reply to Brief in Opposition are two record excerpts from the hearings on this matter which establish the falsity of Respondent's claims. First, Petitioner offered to take a private reprimand for his conduct, an offer which was accepted for two of the other attorneys but rejected for Petitioner. Pages 207-208, excerpt from Volume II, Transcript of Proceedings before the Referee, *The Florida Bar v. Fredric Gerson Levin*, January 17, 1990, appended hereto at the Appendix, Tab "G." Second, Petitioner unequivocally stated that he had discontinued any illegal gambling and would not do so in the future. Pages 199-200, excerpt from Volume II, Transcript of Proceedings before Referee, *The Florida Bar v. Fredric Gerson Levin*, January 17, 1990, appended hereto at the Appendix, Tab "H."

Petitioner submits the clarifications of the record set forth above supplement the record with all essential facts for consideration of the issues raised in the Petition.

ARGUMENT[1]

The Bar states that the issue in this case is whether the Bar Association may discipline an attorney for committing a misdemeanor, facilitating others in committing a misdemeanor, etc. This is not the issue. The Bar can discipline an attorney for almost anything, whether it is a misdemeanor or not, and it should be of no constitutional concern to the highest court in this country. The Bar can, for basically the same conduct, privately reprimand one lawyer, publicly reprimand another, disbar a third, and do nothing to a fourth. However, the Bar cannot, for the same conduct, refuse to prosecute one lawyer, give a private reprimand to another, and then give a harsher sentence to a third because the third publicly expressed an opinion on a television show that he thought gambling on football (even though it was a misdemeanor) was an acceptable recreational activity. That is unconstitutional because it punishes someone for the exercise of their First Amendment rights.

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[1] Because of the confusion with the Florida Bar being the respondent in this case and Fredric Levin being the respondent in the case before The Supreme Court of Florida, the parties will be referred to as "The Bar" and "Levin", rather than petitioner and respondent.

It is Levin's contention that the issue in this case is whether The Florida Bar can selectively enforce disciplinary rules because the attorney publicly expresses an opinion. In the first two sentences of the Bar's argument, it admits that if this is the issue, the Bar loses and the Bar goes on to say that it does not even claim that it has such authority.

As in many cases, the answer in this case is determined by the question. In other words, what is the issue? Both sides agree as to the answer but disagree as to the issue.

Unfortunately for the Bar, The Supreme Court of Florida stated in its decision (Petition for Writ of Certiorari, p. A-12):

> "The Florida Bar argues that respondent's public statements, and his admission that he again would gamble given the opportunity, require the imposition of more severe discipline than a private reprimand. We agree."

As set forth in its Opinion, the Florida Supreme Court recognized that Levin would not gamble illegally again, even if given the opportunity. Petition for Writ of Certiorari at page A-12, n.2. Therefore, the only basis stated in its Opinion for imposing harsher sanctions on Levin was his public statements.

By footnote, The Florida Supreme Court amplified what Mr. Levin stated. Mr. Levin stated his belief on a T.V. show that betting on football games with a bookmaker was an acceptable recreational activity and he also stated that if given the opportunity, he would again bet on football games but only if it was not an ethical violation. He clearly stated on television that if it was determined that it was an ethical violation, he would never do it again. He later stated at his disciplinary hearing that he had, in fact, ceased illegal gambling and would continue to so refrain. Tab "H."

Therefore, the Bar finds itself in the unenviable position of having to abandon its former stance and also abandoning the decision of The Florida Supreme Court which followed what the Bar requested. Having stipulated that at least six other lawyers did essentially the same thing as Levin in regard to the gambling, and having argued that Levin's public statements required the imposition of more severe punishment (which the Bar now recognizes as being an unconstitutional position), the Bar now takes a position before this Court that it can go back to the transcript and find some basis other than the public expression of an attorney's opinion for their selective enforcement. After searching the record, what was it that Levin did more than the four attorneys that received no punishment and the two attorneys who received a private reprimand for what the Bar stipulated was essentially the same conduct? The Bar now says that Levin conspired with third parties in their efforts to place illegal bets and cites as authority in its statement of the case the fact that Levin allowed a social friend to place football bets with Levin's bookmaker. One reason the Bar's present position did not impress The Supreme Court of Florida to use this as the excuse for more severe punishment is that not only did Levin not entice the social friend to place football bets but that it was uncontradicted that he urged his friend to stop betting football when Levin realized that it was becoming too costly for his friend. Page 2, Brief in Opposition.

Probably the best example that the Bar recognizes what the true issue in this case is, is in the Bar's trepidation in its argument as follows:

> "However, it is by no means certain from this record that Petitioner's alleged "expression of opinion" is the sole basis for his more exacting punishment, i.e., a public reprimand as opposed to a private reprimand

> or no punishment for six (6) other attorneys in the Pensacola area involved in placing similar illegal bets in varying degrees. The Referee below expressly observed that the details of these other cases were not known to him; therefore, there is no factual basis on this record to infer that Petitioner is being subjected to harsher punishment merely because of his expression of opinion."

The Bar might take the position that there is no basis on the record to infer that petitioner is being subjected to harsher punishment merely because of his expression of opinion, but the Bar is left with the decision of The Supreme Court of Florida where it clearly states that that was the position of the Bar and that The Supreme Court agreed with it (Petition for Writ of Certiorari, p.A-12). The Florida Bar knows the question that is presented by this case and it knows the obvious answer.

In Levin's Petition for Rehearing in The Supreme Court of Florida (Petition for Writ of Certiorari, p.p. A-15 through A-20), he begged the Court to simply withdraw that portion of its decision where it based its ruling on a clear violation of the First Amendment. The Supreme Court of Florida clearly understood this question but refused to rehear the petition.

The Bar recognizes that it is too late for The Florida Supreme Court to correct the obvious unconstitutional opinion that has been published. The refusal of this Court to accept Levin's Petition for Writ of Certiorari leaves The Florida Supreme Court decision as the law which will stand as a chilling precedent to all attorneys that their freedom of speech on political matters and the advisability of certain laws is going to subject them to punishment should they cross the line by dare suggesting something inconsistent with the positions of the organized Bar.

The bottom line is that the Bar stipulated that all seven attorneys did the same thing, with the exception of Levin who publicly expressed his opinion that he saw nothing wrong with gambling on football. The Florida Supreme Court agreed with the Bar that you can selectively enforce for these public statements. The Bar must abandon that position, as it stated in its brief, because it does not have that authority nor does it any longer claim to have that authority.

The Bar attempts to confuse the issue by making the unsupported assertion that the First Amendment claims in this case are not substantial enough to merit constitutional protection. This ignores the authorities cited in the Petition for Writ of Certiorari at pages 2-3 which establish that wide protection is to be afforded free speech. This also ignores the severity of the sanction sought to be imposed upon Levin, as distinguished from the other six similarly situated attorneys.

The Florida Bar now takes the position that a "public" reprimand is only "slightly" harsher than what it did to the other six attorneys. Four of those attorneys received no discipline whatsoever and two received a private reprimand which is simply a letter placed in their Bar Association file. Is the placing of the petitioner's name forever in The Southern Reporter in a decision of The Florida Supreme Court where it says that as far as the Bar Association is concerned, the distinction between what Mr. Levin did and a drug violation is irrelevant, simply "slightly" harsher than no penalty or a letter in a file? Is it the position of The Florida Bar that it is only a "slight" inconvenience for the petitioner to go before the Board of Governors of The Florida Bar and to stand there and be publicly humiliated? Would the painting of the yellow stripe down the back of the uniform have been of any real significance to the cowardly soldier who had to march out of the compound

among his fellow soldiers than if it had been done by an officer in private and no one knew about it? Does The Florida Bar really believe that there is only a "slight" difference?

The Bar is taking a position which it knows is wrong. As is shown in the record, before this matter became public, Levin offered to plead and receive a private reprimand. Tab "G." The grievance committee voted unanimously that they would not accept such minor punishment as a private reprimand and demanded public humiliation. *Id.* It is disingenuous for The Bar to argue that the penalty imposed was only slightly harsher when The Bar refused a private reprimand of Levin for conduct which The Bar stipulated could not be distinguished from that of the six others disciplined, and when The Bar argued that the only distinction between Levin and the six others is that Levin expressed his opinion.

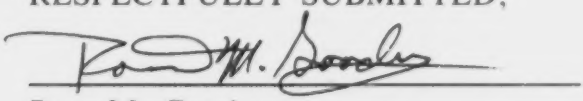
The Bar takes the great part of its brief giving hypotheticals of what The Florida Supreme Court could have done in finding Levin's conduct was different even though The Bar had stipulated that all of the attorneys did substantially the same thing. The problem with this position is that The Florida Supreme Court put the reason for its decision in the opinion and that is that Levin publicly expressed his opinion.

Finally, at page 10 of the Bar's brief, the real issue comes to the forefront again. The Bar says that an attorney who would go on a television show and say that in the State of Florida (where one can legally bet on horse racing, dog racing, jai-alai, bingo or cruise ship casino gambling with dice, black jack, roulette, etc.) that a law which makes it a misdemeanor to bet on a football game as a spectator or on a golf game as a participant is a bad law "should not be allowed to rely upon the constitutional right of free speech to protect him from

discipline." The Bar demonstrates in this position its ignorance of the real issue presented before the Court.

The Supreme Court's protection of First Amendment speech has been applied to all citizens great and small, treating them all alike. The reason for such vigilance is to protect free speech from being improperly chilled in any respect. When any proper expression of opinion is supressed by governmental action, the ripple effect is potentially huge. When, as here, a lawyer who was described by the chief judge of his circuit as perhaps the best lawyer in the state of Florida, is punished for expressing his opinion on a misdemeanor statute, the potential effect upon the public and lawyers alike is immesurable. The public would perceive: "If they can do this to him, I dare not express myself." Acceptance of certiorari in this case is essential to preventing such a result.

RESPECTFULLY SUBMITTED,



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ATTORNEYS FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

CASE NO.: 74,413
TFB NO.: 87-27,937 (01A)

FREDRIC GERSON LEVIN,

Respondent.

V O L U M E II

Transcript of proceedings in the above-styled case before the Honorable W. Fred Turner at the Judicial Building, Courtroom 501, Pensacola, Florida, on January 17, 1990, commencing at 9:00 A.M. Said proceedings were reported by Jo Ann Bryan, Court Reporter and Notary Public.

[Excerpts from pages 199-200.]

Q Mr. Levin, since these charges all came to light, Mr. Baird's arrest and these charges brought against you by The Bar, have you engaged in any illegal sports betting since that time or any illegal betting since then?

A I'm trying to think did I—certainly I've not bet through any bookies, not—I don't even think I've bet on a—I can't think of any bets that I have made. Let me say this: Not because I thought there was an ethical situation. It's just—you know, you get older. Where I used to watch football games on Sunday afternoon, I play with my grandchildren on Sunday afternoon. And I would rather do that than watch football games.

Q What are your intentions with regard to illegal gambling in the future?

A Well, like I, I've got—certainly, one thing. If His Honor and the Florida Supreme Court determine that this is an ethical violation, they don't have to worry about me ever doing it again. I wouldn't do anything to intentionally hurt The Bar or hurt my career. That's one thing.

The other thing is, like I say, you know, there are different things that make a difference to you in life, and one thing they have done is—like I say, over the last three years I have not done it. My children have come back to Pensacola and grandchildren, and I—I don't even know—I had to look in the paper to remember who was going to be playing in the Super Bowl. I didn't spend 15 minutes watching the games last Sunday. It was just of no interest. I was going over to spend some time with my granddaughter.

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[Excerpts from pages 207-208.]

Q Levin, I assume that you have read the complaint in this case that was filed against you by the Florida Bar.

A Yes.

Q Can you tell us how you feel personally about the charges that were made against you concerning possible ethical violations or allegations that you are unethical and have been unethical?

A In other words, what my feelings are about this thing?

Q Yes, sir.

A You told me you were going to ask me that question, and I gave it a lot of thought last night, and I'm—when you realize that there were, to my knowledge 20, 25, or 30 lawyers betting on football games—if you take The Bar's word, there were six that did the same thing I did. And we went before the local Grievance Committee, and we all admitted to betting on football games, and apparently, according to the paper, the only thing I did differently was I wasn't willing to tell them that I thought that that was wrong. And, you know, it's like high school, like grammar school, or like kindergarten. Now, you say it's wrong, little Freddie, and you can get off. And I just didn't think—I thought that if I admitted I had done something wrong—anyhow, when we left that meeting, you told me before I got in there, you said, "Don't do this. Go ahead and apologize to them." And I just couldn't do it.

All right. Then we got out of that committee meeting, and you came to me and you said the Florida Bar would consider a private reprimand. I said, "No, I'm not going to accept any acknowledgement that I did something wrong." And you said,

"You need to do it. You've got a daughter and a son-in-law and a son practicing law, and this is going to be embarrassing to them, regardless of what your feelings." So I let—and I talked to my family, my wife, my kids, my father, and everybody else, and I listened to everybody tell me, "Go ahead and take the private reprimand."

So I called you and told you to go ahead and get the private reprimand from the local Grievance Committee, which was more or as much as they did to anybody. In other words, I would tell them I'm sorry, if that's what they wanted.

And then the next thing I heard is you told me there was a 10-0 vote that my brother lawyers in this community said no, that's not enough. You are to stand before The Bar and let all these people chew you out publicly, and I said uh-uh.